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95-1740

Supreme Court, U.S.
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# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN KOTSIAS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

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On Petition for Writ of Certiorari
to the Supreme Court of Illinois

## PETITION FOR WRIT OF CERTIORARI

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I.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether Illinois state courts interpreted this Court's decisions on ineffective assistance of counsel so restrictively as to render it impossible for Petitioner to establish a deprivation of his Sixth Amendment rights where trial and appellate counsel's deficiencies resulted in actual prejudice.

2. Whether the Illinois state courts deprived Petitioner of due process by considering evidence in sentencing where the court improperly excluded it at trial.

II.

## TABLE OF CONTENTS

Page

Questions Presented for Review.....1

Table of Contents.....2

Table of Cited Authorities.....3

Citations of Reports of Opinions and Orders.....4

Statement of Jurisdiction.....4

Constitutional Provisions Involved....6

Statement of the Case.....6

Argument.....20

III.

## TABLE OF CITED AUTHORITIES


Page

People v. Albanese,
104 Ill.2d 504,
473 N.E.2d 1246 (1984).....20, 30

People v. Baxton,
10 Ill.2d 295,
139 N.E.2d 754 (1957).....21

People v. Saldivar,
113 Ill.2d 256,
497 N.E.2d 1138 (1986).....21

Strickland v. Washington,
466 U.S. 668,
80 L.Ed.2d 674,
104 S.Ct. 2052 (1984).....20, 25
27, 30

U.S. ex rel. William v. Washington,
59 F.3d 673 (7th Cir. 1995).....27

IV.

CITATIONS OF REPORTS
OF OPINIONS AND ORDERS

People v. Kotsias, Nos. 94-4061 & 95-1401 (cons.)(Ill.App.Ct. Sept. 29, 1995)

People v. Kotsias, No. 80174 (Ill.S.Ct. Jan. 31, 1996)

V.

STATEMENT OF JURISDICTION

On September 27, 1994, Petitioner was found guilty of three counts of Domestic Battery. Trial was by jury in the Circuit Court of Cook County, State of Illinois. That court entered judgment on the conviction and the sentence of 364 days imprisonment on November 7, 1994.

Defendant filed a timely appeal to the Illinois Appellate Court. Defendant filed his Post-Conviction Petition in the Circuit Court, which Court denied it after a hearing. He filed a timely appeal to

the Illinois Appellate Court of the denial of the Post-Conviction Petition. Both appeals were consolidated. On September 29, 1995, the Illinois Appellate Court entered an order to affirm both judgments.

Defendant filed a timely Petition for Leave to Appeal (PLA) to the Illinois Supreme Court of the order to affirm issued by the Illinois Appellate Court. The PLA sought discretionary review of the Illinois Appellate Court's order. The Illinois Supreme Court entered an order on January 31, 1996, to deny the PLA. The Illinois Supreme Court is the highest court and the court of last resort in the State of Illinois.

Jurisdiction is conferred on this Court to review the judgment and orders by a Writ of Certiorari pursuant to 28 U.S.C. 1257(3).

## VI.

## CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall ... be deprived of life, liberty, or property, without due process of law ... .

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

## VII.

## STATEMENT OF THE CASE

[References to the Report of Proceedings are designated as "R.___." References to the Common Law Record are designated as "R. C___."]

Defendant was charged with three counts of Domestic Battery. (R. C2) In opening statements, trial counsel told the

jury he wants to "be exceptionally brief" and that he has a "tendency to forget." (R. 7)

Defendant and Cheryl Kotsias married in 1983. Their son, Daniel, was born in January 1992. At the time of the trial, Defendant and Cheryl were seeking a divorce. (R. 9-11)

In July 1992, they lived in a third floor rented apartment in Chicago, Illinois. According to Cheryl, on July 30, 1992, she was sleeping in the living room. Allegedly, Defendant came out of the bedroom with a three-foot dowel rod, with which he struck her on her back, legs, arms and shoulders with full force 12 to 15 times. She claimed the beating left her unable to walk and with bruises on her legs and back. She claimed she still had scars from this beating. (R.

12-17)

Although the police arrived, Cheryl did not leave with them and did not file a complaint. She did not call the police and assumed her neighbors did. (R.33) None of her immediate neighbors in the apartment building heard screams or saw any scars. (R. 18-20) Although Cheryl claimed the walls were stained with blood from this beating, no independent evidence established that. The dowel rod she claimed Defendant used was admitted into evidence, but did not show any blood. (R. 30-31)

Cheryl further alleged Defendant punched her with full force in the eye and cheekbone on August 6, 1992. Cheryl was trying to get her baby son out of the seatbelt and unpack groceries. She claimed Defendant hit her when she dropped

a bag. She claimed that her right eye swelled up as a result. (R. 19-21)

The third alleged beating occurred September 23, 1992. Cheryl claimed Defendant slugged her three or four times with full force on her cheekbone. She then ran to the apartment of neighbors, who referred her to a shelter for battered women (R. 21-23) The People did not produce evidence of medical injuries of any of these three alleged beatings.

Cheryl had been hospitalized for psychiatric treatment shortly before the July 30, 1992, alleged incident and was suicidal then. (R. 32, 27) She attributed her problems to her son's circumcision. (R. 28-29, 34-35) Trial counsel did not object when the People asked Cheryl if there were any other reasons for her psychiatric problems. He

did not object when Cheryl answered that Defendant slugged her in the eye with full force and that she endured many beatings beginning in January 1992. (R. 41) Cheryl said these other beatings were administered by forceful kicks that caused her to involuntarily urinate and resulted in scalp lacerations and bruises. Trial counsel did not object to either this testimony or to the absence of pre-trial discovery about it from the People. (R. 40-42) Trial counsel did not challenge Cheryl on her allegation of scalp lacerations and heavy bleeding. He did not ask about medical treatment Cheryl might have received for these alleged injuries or if any photographs of her injuries were taken. (R. 41) In side-bar, trial counsel argued his defense was that Cheryl "was insane, needing psychiatric

treatment." (R. 47)

Anne Landers, the Kotsiases' downstairs neighbor, testified she awoke on July 30, 1992, when she heard Cheryl screaming, "Stop it, John." Trial counsel did not ask her any questions on her failure to see injuries on or about July 30, 1992. (R. 55, 62-63) Anne Landers also testified she witnessed Defendant hit Cheryl in the face on August 6, 1992. She and her daughter were in their apartment at the time. She said she was sitting in her living room. Later, she claimed she looked out the window of her daughter's room while Defendant and Cheryl were at their car. Cheryl's mouth was bleeding. Defendant told her that what she saw was not a punch. (R. 55-58) She also testified that on September 23, 1992, Cheryl's face was swollen and red. (R.

58-59)

Trial counsel did not ask Anne Landers about her ability to view the attack, although she did state she did not hear anything. (R. 62-63) She testified that there were other beatings before July 30, 1992. Trial counsel did not object to this testimony or to the fact that the People did not disclose it in pre-trial discovery. (R. C10-C15, 67-69) Heather Landers, daughter of Anne, testified she saw Defendant punch the left side of Cheryl's face on August 6, 1992. She said Cheryl's lip was bleeding. She did not hear anything, but said Defendant denied hitting Cheryl. Trial counsel did not cross-examine Heather on her ability to view the attack. (R. 74-76)

Officer Culver testified he responded to a call about screaming on July 30,

1992, at the Kotsias apartment. Defendant told him he was "having some trouble with his wife," that she was mentally ill and that he needed to restrain her sometimes. Culver said Cheryl appeared emaciated and bruised. He claimed Cheryl said Defendant hit her. Trial counsel failed to object to this hearsay testimony. Culver did not arrest Defendant and Cheryl did not leave with him. Trial counsel failed to ask Culver whether Defendant had ever sued him. (R. 77-83)

Michelle Dolan was a Cook County Supportive Service caseworker, assigned to interview Defendant in April 1993 regarding his divorce case. She claimed that Defendant told her he struck Cheryl with a dowel rod on the ankle once to prevent her from hurting herself with a knife. Trial counsel did not object to

this testimony. Ms. Dolan also interviewed Cheryl and did not notice any injuries. (R. 86-89)

The People then rested. Trial counsel then stated his theory of defense was self-defense and defense of others. (R. 95)

Trial counsel made an offer of proof of a video tape made by Defendant on July 27 and July 31, 1992. Trial counsel's sole argument for its admission was it showed Cheryl clearly in need of psychiatric treatment. This argument prompted the Judge to ask if his defense was that it is acceptable to beat a person under psychiatric care. He did not offer the tape for any other reason, such as absence of the physical injuries Cheryl and Culver testified existed on July 30, 1992. (R. 91-95)

In a jury instruction conference, the

prosecutor observed there was much testimony about Defendant's prior bad acts without an objection. Trial counsel failed to offer an instruction on limited use of prior bad acts evidence and the trial court did not give one. (R. 99-100)

Helen Holland is Defendant's mother. In August 1992, Cheryl appeared to her to have a blank look on her face and to be unkempt. (R. 104-07) Dr. E. J. Holland is Defendant's stepfather. A week after the baby was born, Cheryl told him that the baby was dead and that she had a hole in her stomach. She also said she wanted to kill herself. (R. 109-11)

Constance Jarman was a friend of the Kotsiases. In July 1992, she was present when it took 45 minutes to coax a catatonic Cheryl out of the car. In August 1992, Cheryl refused to speak to anyone except to say that she killed the baby by throwing him out the window.

Cheryl never told Ms. Jarman that Defendant hit her. (R. 117-24) The People asked Ms. Jarman if Cheryl failed to wash her hair because of scalp lacerations caused by Defendant. Trial counsel failed to object either to this other crimes evidence or to the People's failure to follow-up on this suggestion. (R. 123) Ms. Jarman heard Cheryl express an intention to kill the baby on five separate occasions that summer. (R. 125-26)

Rita Baumgartner met Defendant in his Tai Chi class. She did not see bruises on Cheryl on September 24, 1992. Cheryl appeared thin and unkempt. Cheryl told her the baby was dead. (R. 125-30)

In July 1992, Kent Faust saw Cheryl put her head in an oven and threaten to jump off the third floor railing. (R. 134-36)

Defendant testified that Cheryl

threatened suicide many times. Eight days after their baby was circumcised, Cheryl began to have hallucinations and entered a hospital for psychiatric reasons. (R. 148-51)

Defendant struck Cheryl with a dowel rod once in July 1992 when he tried to disarm her from a knife. He missed her hand with the dowel rod and hit her foot. Defendant testified that he had to restrain Cheryl other times between April and June 1992. The reasons were because Cheryl ate rat poison, put a plastic bag over her head, threatened to jump off the third floor railing and put her head in an oven. (R. 151-52) On August 6, 1992, he, Cheryl and the baby drove home from shopping. Cheryl began to tug on the baby while he was tangled in the seat belt. The baby began to cry and Defendant waived his hand across her face to get her attention, but did not hit her. (R. 153-

55) Defendant also denied hitting Cheryl on July 30, 1992. He claims Cheryl was sexually molesting the baby then. (R. 170)

Trial counsel told the jury in closing argument that he liked to accelerate trials and get home at a sensible hour. He did not request a limiting instruction on "other crimes" evidence. (R. 185-91) Defendant was found guilty of the three counts. Substitute counsel argued a Motion for New Trial, which Motion was denied.

At sentencing, Defendant produced many character witnesses. Although Defendant had no criminal history, the trial court sentenced him to a 364-day prison term. The trial court referred to the unadmitted video tape as an aggravating factor. The trial court characterized the video tape as "disgusting." (R. 233)

While appeal of his conviction was pending, Defendant filed a Post-Conviction Petition, through which he argued he was denied effective assistance of counsel under the Sixth Amendment. (R. C93-C162) The Petition's appendix included Cheryl's medical records and photographs of the street from the Landerses' apartment. The trial court denied the Petition and Defendant appealed. The Illinois Appellate Court held that although trial counsel's performance was deficient, it did not prejudice Defendant under the Sixth Amendment and this Court's decisions on this issue. (slip op. at 18-19; See Appendix) The same issue of ineffective assistance of counsel was raised to the Illinois Supreme Court. That court denied Defendant leave to appeal on January 30, 1996 in a one-page order. (See Appendix)

VIII.

ARGUMENT

Trial counsel's inept representation of Defendant resulted in actual prejudice to him. In its decision, the Illinois Appellate Court noted that trial counsel's performance was deficient. (slip op. at 10) Yet, in finding no prejudice, that Court misconstrued the evidence and standards mandating reversal for such ineffectiveness as discussed in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) and People v. Albanese, 104 Ill.2d 504, 473 N.E.2d 1246 (1984).

Substitute attorneys compounded the problems by failing to object to the trial court's use of the video tape as an aggravating factor. It is not necessary for counsel at sentencing to inform the court that it is considering incompetent evidence to preserve the issue on appeal.

People v. Saldivar, 113 Ill.2d 256, 266, 497 N.E.2d 1138, 1141 (1986). The trial court specifically referred to the tape just before sentencing Defendant to the maximum 364-day prison term. (R. 233) A court cannot consider incompetent evidence in deciding a sentence. See People v. Baxton, 10 Ill.2d 295, 300, 139 N.E.2d 754, 757 (1957). Defendant's appellate attorney failed to raise the issue of improper consideration of the video tape for sentencing after the same court refused at trial to allow the tape into evidence. Appellate counsel's failure to address that issue was to Defendant's prejudice. Appellate counsel also showed his ineffectiveness by arguing there should have been an instruction on self-defense, eventhough Defendant denied ever striking Cheryl on the dates alleged in the complaints. (slip op. at 8) The result of this absurd argument was to lose

credibility in the Illinois Appellate Court for Defendant's entire appeal. This Court may notice plain errors although they are not brought to the attention of the lower court. Trial counsel was deficient for trying to advance this absurd defense at trial. He failed to understand the obvious axiom that to assert a self-defense theory, Defendant first must admit committing the acts at issue. The Illinois Appellate Court, and the Illinois Supreme Court in denying the PLA, misapprehended the significance of this blunder. The Illinois Appellate Court stated trial counsel was not ineffective because, although his theory of Defendant's case was self-defense, he did not seek a self-defense jury instruction. (slip op. at 9) That court failed to note that trial counsel sought this "defense" during the trial. Trial counsel thereby lost the opportunity to

advance a reasonable doubt defense that would have resulted in not guilty verdicts.

Cheryl testified Defendant hit her on July 30 with full force 12 to 15 times with a dowel rod. She said the beating resulted in blood splattered walls and serious bruises and scars. Trial counsel should have made an offer of proof of the July 31 video tape to show Cheryl had no bruises. Had trial counsel made a correct offer of proof, the tape would have been admitted. Trial counsel failed to cross-examine Anne Landers on her report of hearing Cheryl scream on July 30, failed to object to Cheryl's testimony of "other crimes" dating back to January 1992 and failed to move to strike any future testimony because the People did not reveal it in pre-trial discovery.

Trial counsel had access to Cheryl's April 1992 medical records. The Post-

Conviction Petition included those records and photographs. Therein, Cheryl did not complain of injuries and the examiner noticed none. The medical records reveal that her son's circumcision caused Cheryl's psychiatric problems, not the alleged beatings. She complained of hallucinations of penises at about that time. Cheryl told the medical personnel that Defendant was supportive. She never told them that Defendant hit her at any time. (R. C93-C162) Trial counsel failed to ask for a jury instruction to limit the use of that "other crimes" testimony, assuming it should have been allowed into evidence. The Illinois Appellate Court, and the Illinois Supreme Court in denying the PLA, failed to recognize trial counsel was deficient by not objecting to this testimony. He compounded the already extant problem by not seeking the limiting instruction. The Illinois Appellate Court

correctly noted that failure to seek a limiting instruction when entitled to one is not a matter of discretion or strategy. (slip op. at 10) Moreover, trial counsel was unaware "other crimes" evidence was admitted into evidence at trial. The prejudice to Defendant resulted in guilty verdicts because this "other crimes" evidence was devastating and unchallenged. Therefore, the Illinois Appellate Court erred by finding this deficiency did not meet the Strickland prong of actual prejudice. The Illinois Supreme Court erred in denying leave to appeal this matter.

Trial counsel should have argued to the jury about Cheryl's alleged July 30 injuries. Anyone hit the way she described, with blood splattering the walls, certainly would have exhibited obvious injuries, if she would have survived at all. Trial counsel failed to

cross-examine Cheryl on the absence of medical evidence referring to her alleged injuries and of photographs showing them for any of the three incidents. The cumulative effect of these deficiencies prejudiced Defendant. There are simply no possible strategic or tactical reasons an effective attorney could have had to forfeit these opportunities.

Trial counsel failured to cross-examine Officer Culver on his bias against Defendant. Culver testified seeing Cheryl bruised on July 30 at Defendant's apartment. Trial counsel was aware many months prior to trial that Defendant had sued Culver in 1991. Affidavits from Defendant and Rita Kotsias establish this fact. Yet, trial counsel never asked Culver a single question about this. Affidavits and facsimile messages establish that appellate counsel also was aware of Culver's bias and of trial

counsel's failure to question him on it. Yet, he failed to raise any issue on this in the Illinois Appellate Court brief. This deficiency resulted in actual prejudice to Defendant under Strickland.

Trial counsel failed to investigate the ability the Landerses to hear Cheryl scream on July 30. Failure to investigate and use exculpatory evidence establishes both deficient representation and actual prejudice requiring reversal. See U.S. ex rel. Williams v. Washington, 59 F.3d 673 (7th Cir. 1995). A thorough investigation would have revealed it was impossible to have heard Cheryl clearly from the third floor apartment to the Landerses' basement apartment on the other side of the stairway. An investigation also would have armed trial counsel with the knowledge that the Landerses could not have seen the alleged August 6 attack from their basement window. This impossibility

was discarded by the Illinois Appellate Court without adequetly considering the photographs of that window view. The Illinois Appellate Court inaccurately justified this position by stating trial counsel "extensively cross-examined Anna [sic] and Heather Landers as to their ability to see and hear." (slip op. at 12) The Record on Appeal reveals trial counsel asked each of them only three or four questions about this and never adequately tested their ability to see. Moreover, trial counsel never cross-examined the Landerses about which side of Cheryl's face Defendant hit on August 6. Cheryl said that Defendant hit her right eye (R. 20) and Heather Landers said it was the left side of her face (R. 74). But for these omissions, the jury would have known that the Landerses could not seen the alleged August 6 attack.

The only evidence of a September 23

attack came from Cheryl. The Landerses claim they saw Cheryl's face red and swollen. However, neither they nor any independent evidence established Cheryl's face was in that condition due to a beating. Trial counsel never cross-examined any witness as to alternative explanations of Cheryl's red, swollen face. Further, the Landerses were allowed to testify about incidents of alleged abuse prior to July 30 without challenge by trial counsel either as improper evidence or as a violation of pre-trial discovery rules.

Trial counsel compounded the disastrous effect of his incompetence by suggesting to the jury in opening statements and closing argument that he was taking an indifferent attitude toward the charges facing Defendant. In effect, trial counsel invited the jury to do the same.

The cumulative effect of all instances of trial and appellate counsels' deficient representation reveal that Defendant has met the two-prong standard under Strickland and Albanese. The order of the Illinois Appellate Court continued the deprivation of Defendant's Sixth Amendment right to effective assistance of counsel. The Illinois Supreme Court turned a blind eye to this by denying Defendant leave to appeal. This Court is urged to grant Defendant's Petition for Writ of Certiorari to redress the violation of his fundamental constitutional rights.

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FIFTH DIVISION September 29, 1995
Cons. Nos. 1-94-4061 & 1-95-1401

IN THE ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT

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|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | Appeal from Circuit Court of Cook County. |
| v. | No. 92-MC1-416129 |
| JOHN KOTSIAS, Defendant-Appellant. | The Honorable William P. O'Malley, Judge Presiding. |

ORDER

Defendant, John Kotsias, appeals his conviction of domestic battery, for which he received a 364-day jail term. During the pendency of this appeal, defendant filed a post-conviction petition in the circuit court of Cook County, which was denied. Defendant subsequently appealed that denial, and this court consolidated both appeals. For reasons which follow, we affirm the circuit court's judgment.

Defendant's conviction arose from three incidents of spousal abuse which occurred in the summer of 1992. The victim, Cheryl Kotsias, testified that at 6:00 a.m. on July 30, 1992, defendant struck her back, legs, arms and shoulders 12 to 15 times with a three foot "dowel rod." She further recounted that on August 6, 1992, she and defendant returned to their apartment after grocery shopping. While the couple were unpacking groceries from the car, one of the bags slipped from Cheryl's hand. Defendant then came over to Cheryl and punched her in the eye with his fist. According to Cheryl, a neighbor, Heather Landers, came out from her apartment and asked defendant why he was hitting Cheryl and demanded that he stop.

Finally, on September 23, 1992, defendant "slugged Cheryl in the face

while she was feeding the couple's infant son, Daniel. Defendant hit her three to four more times in this manner. She then ran to a neighbor's apartment and reported the incident to authorities. Two days later, she entered a shelter for battered women.

During cross-examination, Cheryl admitted that she had experienced some emotional problems during the time period in question. These emotional problems related to Daniel's circumcision. Apparently, Daniel developed some medical problem after the circumcision had been performed, and Cheryl suffered from depression from it. She acknowledged that she had tried to jump from a third story window and had been admitted into three different psychiatric units. Cheryl also stated that she knew the martial art of Tai Chi. Both she and defendant gave

classes in Tai Chi.

Anna Landers testified that she called police to her apartment on July 30, 1992, when she heard Cheryl's screams at 6:30 a.m. She also saw defendant punch Cheryl in the face on August 6, 1992. Landers' daughter, Heather, ran out and confronted defendant about the incident.

Heather Landers stated that she saw defendant punch Cheryl on August 6, 1992. Heather ran outside and told defendant to stop. Defendant told Heather that he did not punch Cheryl.

Chicago police officer Culver investigated Anna Landers' report to the police and went to the Kotsias' apartment on July 30, 1992. Defendant answered the door and explained to Culver that "he was having some trouble with his wife." Defendant also told Culver that his wife had been mentally ill and sometimes needed

to be restrained. Culver informed defendant that Culver was obligated to see Cheryl and speak to her alone. Defendant became reluctant and uncooperative, but eventually capitulated. When alone, Cheryl told Culver that defendant had hit her. According to Culver, Cheryl appeared emaciated and bruised. However, she declined Culver's assistance in either leaving the apartment or formalizing charges.

Michelle Dolan, a case worker at Cook County Supportive Services, testified that she had interviewed defendant with regard to his divorce case in April 1993. During the interview, defendant admitted that he struck Cheryl once with a dowel rod in order to prevent her from hurting herself.

Defendant testified that he met Cheryl in 1976 when she was a student in his Tai Chi class. The couple lived

together for five years and married in 1983. Their son, Daniel, was born in 1992. Daniel was circumcised about eight days after his birth. Cheryl fainted during the circumcision when she saw blood. According to defendant, Cheryl was not the same person that he had known from that date forward. She began to hallucinate and attempted suicide several times. After the suicide attempts, defendant brought Cheryl to a hospital for psychiatric treatment.

Defendant admitted to striking Cheryl once with a dowel rod sometime in the late spring of 1992. He did so because Cheryl was "wielding" a knife while both defendant and Daniel were nearby. Defendant stated that he merely tried to use the dowel rod to strike the knife from Cheryl's hand. He missed, however, and struck her across her ankle. Defendant

maintained that this was the only occasion on which he struck Cheryl.

As to the incidents at issue, defendant specifically denied striking Cheryl with the dowel rod on July 30, 1992. With respect to the August 6, 1992 incident, defendant testified that he, Cheryl, and Daniel had gone to the grocery store. As they were unloading the groceries from the car, defendant saw Cheryl "tugging" on the baby. However, she had not removed the safety belt and the baby's leg was being pulled against the belt. To stop Cheryl from hurting the baby, defendant flashed his hand across Cheryl's face, to distract her from the baby. Defendant insisted that he did not strike her and did not cause her any harm.

Defendant's mother testified in his behalf. She recalled visiting defendant and Cheryl in August 1992. During the

visit, Cheryl was in bed, with a blank look on her face.

Defendant's stepfather, Dr. E. J. Holland, also testified for defendant. Dr. Holland spoke with Cheryl within one week of her son's birth. Cheryl was upset and crying. She told Dr. Holland the baby was dead and that she had a hole in her stomach. She also told him that she wanted to kill herself.

Constance Jarman testified that defendant and Cheryl visited her in July 1992. Jarman characterized Cheryl as "catatonic." Cheryl had to be coaxed from the car. Jarman visited the couple during the first week of August 1992. Cheryl was in bed and refused to speak to anyone. When she did speak, she told Jarman, "The baby is dead. I killed the baby." Although Jarman reassured Cheryl that the baby was alive, Cheryl kept repeating that

the baby was dead.

Rita Baumgartner met defendant while a student in defendant's Tai Chi class. Baumgartner became a regular visitor to the Kotsias apartment during the summer of 1992. She recalled that Cheryl often appeared very thin and unkempt, but was never bruised. Cheryl told Baumgartner on several occasions that the baby was dead.

The jury returned a guilty verdict and the court continued the case for sentencing.

Defendant retained a new attorney for the post-trial proceedings. During the sentence hearing, defendant called several witnesses who testified to defendant's compassionate and nonviolent nature. The circuit court then imposed the previously noted 364 day jail term.

While this appeal was pending, defendant filed a post-conviction petition

in the circuit court. In that petition, defendant alleged that he received ineffective assistance of counsel in that his trial attorney (i) failed to ask for a self-defense instruction, (ii) failed to adequately investigate the case, and (iii) failed to object to testimony concerning prior bad acts purportedly committed by defendant. The circuit court denied the petition.

The sole issue before this court is whether defendant's counsel was so constitutionally deficient as to deprive defendant of his right to a fair trial. To that end, defendant asserts the same three-prong challenge to his trial attorney's effectiveness as he did in his post-conviction petition.

Generally, in order to establish ineffective assistance of counsel, a defendant must show that counsel's

representation fell below an objective standard of reasonableness and that a reasonable probability exists that, but for the error, the result would have been different. (Strickland v. Washington (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.) In adopting the Strickland standard, our supreme court noted the heavy burden defendant bears to overcome the strong presumption in favor of a finding that counsel's advocacy was not ineffective. (People v.Albanese (1984), 104 Ill.2d 504, 473 N.E.2d 1246.) Further, the determination of the reasonableness of trial counsel's actions must be evaluated from counsel's perspective at the time of the alleged error, without hindsight, in light of the totality of the circumstances. (Strickland v. Washington, 466 U.S. at 668, 80 L.Ed.2d at 674, 104 S.Ct. at

2052.) It is important to note, however, that courts may resolve ineffectiveness claims under the two-part Strickland test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance. People v. Erickson (1994), 161 Ill.2d 82, 90, 641 N.E.2d 455, cert. denied (1995), __ U.S. __, 131 L.Ed.2d 849, 115 S.Ct. 1956.

Defendant has not met his burden in establishing his claim with regard to his attorney's failure to tender an instruction based upon self-defense or defense of others. At trial, defendant testified on his behalf and denied hitting Cheryl on the dates in question.

Section 7-1 of the Criminal Code provides that "[a] person is justified in the use of force against another when and to the extent that he reasonably believes

that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." (720 ILCS 5/7-1 (West 1992.) By raising one of the justifiable use of force defenses, either self defense or defense of another, a defendant admits committing the act at issue, but claims legal justification for doing so. People v. Hawkins (1980), 88 Ill.App.3d 178, 410 N.E.2d 309.

The evidence presented by defendant in this case is simply insufficient to meet the minimal requirement of "some evidence" to warrant a self defense or

defense of another instruction. (People v. Bratcher (1976), 63 Ill.2d 534, 349 N.E.2d 31.) Defendant testified that he did not hit Cheryl with the dowel rod on July 30. He claimed he did not punch her in the face on August 6, but rather merely waved his hand in front of her to "distract" her from pulling on Daniel's leg. In his brief, defendant points to his own testimony regarding an earlier incident in which he did hit Cheryl in the ankle with the rod because she was "wielding" a knife. That incident, however, was not at issue in this case. If, however, as defendant asserted at trial, he never used force against Cheryl on the dates charged, then it logically follows that he could not have reasonably believed force was necessary to protect himself or his son. As this court has noted "raising the issue of self defense

requires as its sine qua non that defendant had admitted [the battery] as the basis for a belief that the exertion of such force was necessary." (People v. Lahori (1973), 13 Ill.App.3d 572, 577, 300 N.E.2d 761.) Because defendant denied committing the acts, his counsel was not ineffective in not seeking the instruction.

Defendant next identifies his trial attorney's failure to object to evidence concerning prior bad acts as a additional basis for a finding of ineffectiveness.

During the State's redirect examination of both Cheryl and Anna Landers, testimony was adduced about other incidents of defendant's abuse of Cheryl dating back to January 1992. Defendant states that none of the other beatings were alleged in the criminal complaints nor were they noted in the discovery,

which had been tendered to the defense.

Generally, evidence of other criminal acts is inadmissible if it is introduced merely to establish a defendant's propensity to commit crime. (People v. Richardson (1988), 123 Ill.2d 322, 528 N.E.2d 612.) Exceptions to this general rule exist, however. Such evidence will be admitted if is probative of motive, intent, identity, absence of mistake or accident or modus operandi. (People v. McKibbons (12983), 96 Ill.2d 176, 449 N.E.2d 821.) In those instances, the evidence may be considered for the limited purpose of the exception. The decision to admit the evidence is within the discretion of the circuit court. People v. Ward (1984), 101 Ill.2d 443, 455-56, 463 N.E.2d 696.

Here, the evidence would have been admissible as to defendant's intent and

absence of an innocent frame of mind. It tends to show that the acts in question were not performed innocuously, thus diminishing the credibility of defendant's version of events, particularly with regard to the August 6, 1992 incident. See e.g., People v. Gaither (1991), 221 Ill.App.3d 629, 582 N.E.2d 735.

Defendant maintains, however, that even if we were to find that the evidence was unobjectionable, counsel's performance was still deficient because he failed to ask for a jury instruction limiting the manner in which that jury was to consider the evidence.

As noted, evidence of prior bad acts may be introduced for certain limited purposes, but not to demonstrate that a defendant has a propensity to commit the crime charged. An attorney's failure to seek a limiting instruction when he is

entitled to one cannot be considered a matter of discretion or trial strategy. (People v. Markiewicz (1993), 246 Ill.App.3d 31, 48, 615 N.E.2d 869, appeal denied, 152 Ill.2d 571, 622 N.E.2d 1219.) Thus, such a failure demonstrates that an attorney's performance was deficient, but it does not prove the second Strickland prong, that the attorney's poor performance prejudiced the defendant to such an extent that he was denied a fair trial. (People v. Hooker (1993), 253 Ill.App.3d 1075, 1085, 625 N.E.2d 1081.) Generally, the only instructions necessary to ensure a fair trial include the elements of the crime charged, the presumption of innocence, and the question of burden of proof. People v. Turner (1989), 128 Ill.2d 540, 562-63, 539 N.E.2d 1196, cert. denied, 493 U.S. 939, 107 L.Ed.2d 326, 110 S.Ct. 337.

In this case, the instruction did not implicate any of the above-noted areas. We further, note that the evidence in this case was not close. Cheryl's testimony regarding two of the charged incidents was corroborated by other witnesses. For example, neighbors heard Cheryl's cries on July 30 and called police to the scene. Officer Culver responded to the call and found Cheryl bruised. As to the August 6 incident, Heather Landers testified that she saw defendant hit Cheryl and confronted defendant at the scene. Based on the evidence, we cannot agree with defendant's contention that but for the instruction, the outcome of the trial would have been different.

Defendant next argues that defense counsel failed to adequately investigate the crimes charged. He claims that had counsel done so, he would have discovered

that the location of the Landers' apartment rendered them unable to view the street where defendant allegedly punched Cheryl. Defendant also asserts that a proper pretrial investigation would have yielded hospital records which would have contradicted Cheryl's trial testimony. Defendant's post-conviction petition contains the affidavit of a defense investigator who swore that he had been in the Landers' apartment and could not view the street in the manner in which they had testified at trial. Photographs of the exterior of the apartment complex were attached to the petition as further demonstration of the investigator's statement as were hospital records from the facilities at which Cheryl had undergone psychiatric treatment.

We begin our discussion of this issue by noting that defendant's trial attorney

extensively cross-examined Anna and Heather Landers as to their ability both to see and hear what they testified as to having seen and heard. Counsel elicited from the witnesses the fact that their basement apartment had a limited view of the street. Nevertheless, both witnesses steadfastly maintained that they had seen defendant punch Cheryl from their windows. The photographs of the apartment which are attached to the post-conviction petition do not foreclose that these witnesses could not have seen what they testified to having seen. Thus, we cannot say that defense counsel's failure to investigate the scene undermines our confidence in the jury's verdict. See People v. Hobley (1994), 159 Ill.2d 272, 637 N.E.2d 992.

As to the hospital records, we note that defense counsel cross-examined Cheryl as to her psychiatric health and the

reasons for her despondency. She admitted that its root was in Daniel's birth and circumcision. She also blamed defendant's violent attacks on her for her mental problems. Although defendant correctly points out that the hospital reports do not contain any mention of defendant's violence toward Cheryl, we note that the reports predated the incidents charged in this case. Thus, the hospital reports do not contradict Cheryl's trial testimony as to three attacks at issue. For this reason, we cannot say trial counsel's failure to subpoena the records demonstrated prejudice sufficient to satisfy the Strickland standard.

Accordingly, defendant's conviction and the denial of his post-conviction petition are affirmed.

T. O'BRIEN, with COUSINS, P.J., and MCNULTY, J., concurring.

80174

ILLINOIS SUPREME COURT
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January 31, 1996

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No. 80174 - People State of Illinois, respondent, v. John Kotsias, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 22, 1996.